Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1245

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

HOUSTON DAVID HUGHES, D.D.S.

v.

LOUISIANA STATE BOARD OF DENTISTRY

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

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January 26, 1987

QUESTION PRESENTED

Whether the Louisiana State Board of Dentistry denied petitioner due process of law (1) by refusing to grant a continuance to allow trial counsel time to prepare the defense and (2) by conducting an eighteen-hour disciplinary hearing without recess, ending in the fatigue of defense counsel and at 4 o'clock in the morning.

INDEX

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
1. Background	2
2. The Motion to Continue	3
3. The Marathon Hearing	4
4. The Board's Decision	5
5. The Proceedings on Judicial Review	6
REASONS FOR GRANTING THE WRIT	7

INDEX (Continued)

Page

I. THE REFUSAL OF THE LOUISIANA STATE BOARD OF DENTISTRY TO GRANT A CONTINUANCE TO ALLOW COUNSEL OF PETITIONER'S CHOICE TO PREPARE THE DEFENSE CONFLICTS WITH RULINGS OF THIS COURT AND WITH OTHER STATE AND FEDERAL COURTS 9

II. THE BOARD VIOLATED DUE PROCESS BY CONDUCTING AN EIGHTEEN-HOUR EVIDENTIARY HEARING WITHOUT RECESS 12

III. SUBSTANTIAL RIGHTS OF PETITIONER WERE PREJUDICED DURING THE DISCIPLINARY HEARING 13

CONCLUSION 15

APPENDIX A
(Opinion and Judgment of Court of Appeal) 1a

APPENDIX B
(Decision of District Court) 13a

APPENDIX C
(Decision of Louisiana State Board of Dentistry) 19a

TABLE OF AUTHORITIES

CASES: *Page*

Aetna Life Insurance Co., v. *Lavoie*, 475 U.S. ____, 106 S. Ct. 1580 (1986) 12

Breithaupt v. *Abram*, 352 U.S. 432, 436 (1957) 8

Brown v. *State*, 630 S.W.2d 876 (Tex. App. 1982) 8, 11

Burdeau v. *McDowell*, 256 U.S. 465 (1921) 15

Chandler v. *Fretag*, 348 U.S. 3 (1954) 8, 9, 11

Chlomos v. *U.S. Department of Justice, Im. & Nat. Service*, 516 F.2d 310 (3rd Cir. 1975) 8, 11

Fikes v. *Alabama*, 352 U.S. 191 (1957) 8

Gandy v. *State of Alabama*, 569 F. 2d 1318 (5th Cir. 1978) 8, 11, 14

Gibson v. *Berryhill*, 411 U.S. 564 (1973) 9

Gilchrist v. *Commonwealth*, 317 S.E. 2d 784 (Va. 1984) 8, 11

In re Ruffalo, 390 U.S. 544 (1968) 9

In re Murchison, 349 U.S. 133 (1955) 9, 12

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951) 7, 13

People v. *Courts*, 693 P. 2d 778 (Cal. 1985) 8, 11

Powell v. *Alabama*, 287 U.S. 45 (1932) 9

Smith v. *Commonwealth*, 156 S.E. 577 (Va. 1931) 12

TABLE OF AUTHORITIES (Continued)

Page

State v. *Dias*, 374 A. 2d 1028 (R.I. 1977) 8, 11

Ungar v. *Sarafite*, 376 U.S. 575 (1964) 7, 10, 11, 12

United States v. *Diharce-Estrada*, 526 F. 2d 637 (5th Cir. 1976) 7, 8, 12, 13

STATUTES:

La. R.S. 37:776(7) 6 n.4

La. R.S. 37:776(8) 6 n.4

La. R.S. 37:776(10) 5

La. R.S. 37:780 10

La. R.S. 49:950 6

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LOUISIANA STATE BOARD OF DENTISTRY

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

Petitioner Houston David Hughes, D.D.S., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana Fourth Circuit Court of Appeal entered in this matter on May 12, 1986.

OPINIONS BELOW

The May 12, 1986 opinion of the Louisiana Fourth Circuit Court of Appeal is reported at 490 So.2d 1097 and is reprinted herein, Appendix, p. 1a, *infra*. The judgment and opinion of the Civil District Court for the Parish of Orleans of June 28, 1985 (Honorable Robert A. Katz, Judge), affirming the suspension of petitioner's license, is unreported and appears herein, App., p. 13a, *infra*. The findings of fact, conclusions of law, and

decision of the Louisiana State Board of Dentistry of December 21, 1984, appears herein, App., p. 1a, *infra*.

JURISDICTION

The judgment of the Louisiana Fourth Circuit Court of Appeal was entered on May 12, 1986. Rehearing in the Fourth Circuit Court of Appeal was denied on July 16, 1986. The Louisiana Supreme Court denied certiorari on October 31, 1986 (496 So.2d 326). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

1. Background:

Petitioner is a well-known figure within the Louisiana dental establishment. He is the founder and principal proponent of "Denta-Care," a program designed to make dental care available to a larger segment of the public at a lower cost than that associated with traditional dentistry. "Denta-Care" provides the consumer with a contractual arrangement whereby a monthly payment entitles the patient to certain guaranteed services at no additional cost and to other services at a discounted rate of fifty percent from a fixed fee schedule. Dentists, like Dr. Hughes, who participate in the program become shareholders in "Denta-Care," a Louisiana corporation, which has approximately forty-eight participating dentists. There is an apparent concern that "Denta-Care" poses an economic threat to traditional dentistry.

None of the patients who testified for the Board against Dr. Hughes initiated the disciplinary proceeding by filing a complaint. Rather, the testifying patients were first contacted by a detective agency hired by the Board[1] and the Board itself initiated the proceeding with an unsworn complaint.[2]

2. The Motion to Continue:

Petitioner was charged with thirteen specifications of professional misconduct, subsumed under three charges. Petitioner received notice on November 16, 1984 that the Board would conduct the disciplinary hearing on December 8, 1984. Three days later, Dr. Hughes, through his regular counsel, Frank H. Dickinson, III, moved for a continuance until January 29, 1985. With only twenty-one days between the receipt of notice and the scheduled December 8th hearing, extending over the Thanksgiving holidays, more time was needed to prepare the defense. Dr. Hughes was notified by the Board ten days later that his motion to continue had been denied. Within a week, on December 6, 1984, Dr. Hughes retained Arthur A. Lemann, III, an experienced New Orleans criminal defense lawyer, to serve as trial counsel in the disciplinary hearing. On the same day, by hand-delivered letter, Mr. Lemann requested a thirty-day continuance to provide sufficient time to prepare the defense. The motion was likewise denied by the Board. Because of the Board's refusal to grant trial counsel any time

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[1] See Transcript of Hearing, December 8-9, 1984 [hereafter cited as "T.H."], Vol. III, pp. 61-62.

[2] The Court of Appeal incorrectly stated that the charges against Dr. Hughes "emanated from the investigation of complaints from dentists, dental assistants and patients in the greater Baton Rouge area." Appendix, p. 39, *infra*. That is an assertion of Board counsel unsupported by the record. On the contrary, the record establishes that the disciplinary proceeding against Dr. Hughes was initiated by the Board itself through an unsworn complaint.

for preparation, the questioning and cross-examination of all witnesses during the hearing had to be done by co-counsel.

3. The Marathon Hearing:

The disciplinary hearing began at 10:06 a.m. on Saturday, December 8, 1984. At approximately 6:15 p.m. that evening, after some eight hours of testimony with only a twenty-minute lunch break, counsel for Dr. Hughes objected to continuing the proceeding without a recess. T.H., Vol. III, p. 7. This request was overruled by the Board. *Id.*

At 10:30 p.m., after roughly 12 hours of testimony, Board counsel completed his case. Dr. Hughes moved for a recess until 10 a.m. the next day. T.H., Vol. IV, pp. 206-207. Arthur A. Lemann, III, who had been retained as trial counsel, stated that he was no longer mentally alert, that rest and additional time were needed to present the defense, and that it was unfair to require Dr. Hughes to present his case after the Board had heard 12 hours of virtually uninterrupted testimony. T.H., Vol. IV, pp. 206-207. The motion was denied.

After roughly 16 hours of testimony, Mr. Lemann stated that he was no longer effectively representing his client:

> "MR. LEMANN: It's now been some 16½ hours, almost 16½, I want the record to be abundantly clear that I don't feel as though I am effectively representing my client. I find that I can no longer concentrate; I am tired; I cannot keep my thoughts in order, and I want the record to so reflect."

T.H. Vol. V, p. 446.

Dr. Hughes was not called as a witness in his own behalf until after 17 hours of testimony:

> "MR. LEMANN: . . . All the witnesses have been in this hotel since 10:00 this morning. At most, there may

> have been five minutes' worth of delay in bringing these witnesses in, and for the record again, I want to say I think it's unconscionable that this Board has required this doctor to go through this ordeal. He now has to testify, and it's been 17 straight hours that have gone by before he gets to testify."
>
> "DR. KALPAKIS [Chairman of the hearing panel]: The record reflected that many times. Let's proceed."

T.H., Vol. V, pp. 464-465.

At one point, co-counsel for Dr. Hughes noted for the record that Arthur Lemann had fallen asleep from exhaustion. T.H., Vol. V, p. 483.

Dr. Hughes rested his case at 3:30 a.m. Sunday morning, December 9, 1984. T.H., Vol. V, p. 499. The hearing panel immediately deliberated and determined guilt on seven charges. *Id.*, at p. 514.

The hearing concluded at 4:15 a.m. Sunday morning, December 9, 1984, more than 18 hours after it began. T.H., Vol. V, p. 521.

4. The Board's Decision:

Dr. Hughes was found guilty of seven acts of professional misconduct relating to his practice of orthodontics.[3] The professional misconduct consisted of the unauthorized use of dental assistants in "cementing, banding, and wiring" braces on patients in violation of La. R.S. 37:776(10). There was no finding, however, that the work performed by the assistants constituted professional incompetency or the substandard practice of

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[3] A licensed dentist, such as Dr. Hughes, is permitted to practice orthodontics so long as he does not represent himself to the public as a specialist or orthodontist.

dentistry.[4] For each specification upon which Dr. Hughes was adjudicated guilty, the Board suspended him from the practice of dentistry for five years concurrently and imposed the maximum fine of $1,000.00 per specification for a total of $7,000.00, plus costs of the disciplinary proceeding estimated at $21,346.59. Appendix, p. 31a.

5. Proceedings on Judicial Review:

Pursuant to Louisiana's Administrative Procedure Act, La. R.S. 49:950, *et seq.*, Dr. Hughes filed a timely petition for judicial review in the Civil District Court for the Parish of Orleans. Dr. Hughes claimed, *inter alia*, that the Board denied him due process of law (1) by refusing to grant a thirty-day continuance to allow trial counsel time to prepare and (2) by conducting an eighteen-hour evidentiary hearing without recess. The district court affirmed.

The Fourth Circuit Court of Appeal affirmed in part and reversed in part. The Fourth Circuit reversed the Board's adjudication on three of the seven specifications on the ground of multiplicity, *i.e.*, that the Board twice punished Dr. Hughes for the same conduct. As to the remaining four specifications, the Court of Appeal affirmed, finding that Dr. Hughes failed to carry the burden of showing substantial prejudice on the claimed due process violations.

The Louisiana Supreme Court denied certiorari on October 31, 1986. Chief Justice Dixon would have granted the writ.

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[4] Although Charge I alleged violations of La. R.S. 37:776(7) and (8), relating to professional incompetency and the substandard practice of dentistry, in addition to a violation of subsection 10, the Board, in adjudicating responsibility for the conduct contained in Specifications 3, 5, and 7 of this charge did so solely on the basis that the work was unauthorized. Dr. Hughes was thereby exonerated from any finding that the work performed by his assistants fell below acceptable standards.

REASONS FOR GRANTING THE WRIT

"Fairness of procedure is 'due process in the primary sense.' " *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness," *id.* at 170. "Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances," Mr. Justice Frankfurter has nobly said. *Id.* at 174.

This Court should grant certiorari in this case in order to vouchsafe "that feeling of just treatment," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 162 (Frankfurter, J., concurring), enforced by law between the individual and government by the Due Process Clause of the Fourteenth Amendment.

Surely an eighteen-hour disciplinary hearing without recess, ending at 4 o'clock Sunday morning, shocks the conscience. And there was no good reason, other than a "myopic insistence upon expeditiousness in the face of a justifiable request for delay," *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), for the Louisiana State Board of Dentistry to refuse counsel's request for a pretrial continuance to prepare the defense or for the Board to refuse the request for a recess during the hearing at 10:30 at night, after 12 hours of virtually uninterrupted testimony.

This Court has not hesitated in the past to champion the due process right of both criminal and civil litigants to counsel of their own choice; arbitrary denial of a request for a continuance

to employ counsel and to permit trial preparation violates due process. *Chandler v. Fretag*, 348 U.S. 3 (1954). *Accord, Chlomos v. U.S. Dept. of Justice, Im. & Nat. Service*, 516 F.2d 310 (3d Cir. 1975); *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976); *Gandy v. State of Alabama*, 569 F.2d 1318 (5th Cir. 1978); *State v. Dias*, 374 A.2d 1028 (R.I. 1977); *Brown v. State*, 630 S.W.2d 876 (Tex. App. 1982); *Gilchrist v. Com.*, 317 S.E.2d 784 (Va. 1984); *People v. Courts*, 693 P.2d 778 (Cal. 1985).

We recognize that state administrative practice is generally a rough and tumble affair. But there comes a point at which the "Plimsol line of 'due process,'" to borrow again from Justice Frankfurter, *Fikes* v. *Alabama*, 352 U.S. 191, 199 (Frankfurter, J., concurring), has been reached. Such is the case here, measuring the eighteen-hour marathon hearing by the yardstick of due process — "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (per Clark, J.).

This Court is familiar with long hours of hard work. But not even the Long Conference at the opening of the Term goes without recess, and the thought of the members of the Supreme Court of the United States, or the Louisiana State Board of Dentistry, meeting for eighteen hours straight, past 4 o'clock Sunday morning, troubles the mind. Justices and their law clerks, lawyers, dentists — all are subject to fatigue after eighteen hours' straining at their work. Contrary to the reasoning of the court below, we think "it is reasonable to assume that [defense counsel] was at far less than his best professionally," *United States v. Diharce-Estrada*, 526 F.2d at 640, after being forced marched by the Louisiana State Board of Dentistry through eighteen hours of testimony.

Such a brutal marathon imperatively calls for corrective review by this Court.

I.

THE REFUSAL OF THE LOUISIANA STATE BOARD OF DENTISTRY TO GRANT A CONTINUANCE TO ALLOW COUNSEL OF PETITIONER'S CHOICE TO PREPARE THE DEFENSE CONFLICTS WITH RULINGS OF THIS COURT AND WITH OTHER STATE AND FEDERAL COURTS.

This Court has held that an arbitrary refusal to continue a criminal case so as to allow defendant time to employ counsel and prepare the defense violates due process. *Chandler v. Fretag*, 348 U.S. 3 (1954). And Your Honors have emphasized that, "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932), quoted with emphasis added in *Chandler v. Fretag, supra*, at 10.

Administrative proceedings involving adjudication of professional misconduct are subject to the constraints of due process, *Gibson v. Berryhill*, 411 U.S. 564 (1973). They are considered "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968). Petitioner plainly had a due process right to "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), including the right to present his defense through counsel of his own choosing.

The record in this case presents a paradigm of "a myopic insistence upon expeditiousness in the face of a justifiable

request for delay," *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), which this Court has said "can render the right to defend with counsel an empty formality." *Id.* The record below establishes overwhelmingly that petitioner's request for a continuance was reasonable. This was not a case where prior settings were frustrated through dilatory action. The requested continuance would have extended only the initial fixing of the hearing. While it is true that there was technical compliance with La. R.S. 37:780, which requires only twenty days' notice prior to a disciplinary hearing,[5] the question nonetheless is whether the Board erred in denying the continuance under constitutional principles of due process and fair play. As to that question, this Court has said:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 U.S. at 589.

The circumstances here are devoid of any bad faith on the part of petitioner in requesting a continuance to allow employment of an experienced defense lawyer and time to prepare his case. This was not a trifling disciplinary proceeding. Rather, it was lengthy and complex, with the Board calling some fourteen witnesses in an attempt to establish thirteen specifications of professional wrongdoing. Dr. Hughes was given only three weeks, extending over the Thanksgiving holidays, to prepare

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[5] La. R.S. 37:780 provides in part:

Service of this notice shall be personal or by delivery to the place of business or residence of the accused, at least twenty days before the time fixed for the hearing or before the time and place to which adjourned.

his defense to these lengthy and complex charges. Absolutely no time was given to trial counsel to prepare the case. Consequently, Mr. Lemann was unable to participate in questioning and cross-examining witnesses.

After weighing all of the factors in favor of the requested one month continuance against the absence of any counterveiling reasons articulated by the Board,[6] it becomes clear that the denial of the continuance denied petitioner due process of law. Superficial compliance with the twenty-day notice was not the end, but the starting point, for a due process analysis of this issue. Under such an analysis, we submit it was fundamentally unfair to deny Dr. Hughes's request for a thirty-day continuance.

Because the ruling below is directly at odds with the reasoning of this Court in *Chandler v. Fretag* and *Ungar v. Sarafite* reversal is required. So too under the constitutional rulings of various federal Circuit Courts of Appeals, *e.g.*, *Gandy v. State of Alabama*, 569 F.2d 1318 (5th Cir. 1978) (and cases cited), *Chlomos v. U.S. Dept. of Justice, Im. & Nat. Service*, 516 F.2d 310 (3d Cir. 1975), and of numerous state courts, *viz.*: *State v. Dias*, 374 A.2d 1028 (R.I. 1977); *Brown v. State*, 630 S.W.2d 876 (Tex. App. 1982); *Gilchrist v. Commonwealth*, 317 S.E.2d 784 (Va. 1984); *People v. Courts*, 693 P.2d 778 (Cal. 1985).

"An ideal system of laws would be one in which speedy justice is administered, but justice and not speed should be its para-

[6] *Cf. Gandy v. State of Alabama*, 569 F.2d 1318, 1324 (5th Cir. 1978):

While what is a "fair or reasonable opportunity" depends upon all the surrounding circumstances, some factors to be considered include: (1) the length of the requested delay; (2) whether the lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested and granted; (4) the balanced convenience or inconvenience to litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a legitimate reason, or whether it is dilatory and contrived; (6) whether there are other unique factors present.

mount purpose," the Supreme Court of Virginia has said. *Smith v. Commonwealth*, 156 S.E. 577, 579 (Va. 1931), quoted in *Gilchrist v. Commonwealth*, *supra*, at 787 (holding denial of continuance violated due process). And in the apt words of this Court: "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice,' " *In re Murchison*, 349 U.S. 133, 136 (1955), quoted in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, ____, 106 S.Ct. 1580, 1587 (1986).

The State Board of Dentistry's stubborn refusal to allow Dr. Hughes a fair opportunity to employ counsel of his choice and to give trial counsel time to prepare the defense hardly satisfies the appearance of justice. And we submit that the usual deference shown to a trial court's decision granting or denying a continuance, *Ungar v. Sarafite*, 376 U.S. at 591, is wholly out of place in testing the constitutionality of the Louisiana State Board of Dentistry's refusal to continue Dr. Hughes's case. Dentists are not guardians of due process. The State Board was in the position of an adverse party and its rulings plainly show it to be more interested in speed than in justice.

II.

THE BOARD VIOLATED DUE PROCESS BY CONDUCTING AN EIGHTEEN-HOUR EVIDENTIARY HEARING WITHOUT RECESS.

While discretionary, appellate courts have reversed trial courts for failing to grant a recess to provide an adequate opportunity to present one's case. See, *e.g.*, *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976). The district court below said it would have been "preferable" for the Board to have granted a recess. Appendix, p. 17a, *infra*. The Court of Appeal described the hearing as "quite lengthy." Appendix, p. 7a, *infra*.

In truth, the duration and brutality of the eighteen-hour hearing was contrary to all civilized notions of fair play. The ordeal was better designed to test stamina than to dispense justice. In short, this grotesque precedent[7] should not be allowed to stand. One might just as well return to the Spanish Inquisition or the Court of Star Chamber. The result was just as lethal and equally brutal. *Cf. United States v. Diharce-Estrada*, 526 F.2d 637, 638 (5th Cir. 1976) ("[J]ustice which is too swift may result in the denial of the right to a fair trial.").

III.

SUBSTANTIAL RIGHTS OF PETITIONER WERE PREJUDICED DURING THE DISCIPLINARY HEARING.

Unquestionably, the manner in which the instant disciplinary proceeding was conducted violated due process. The tyrannical insistence on holding an eighteen-hour evidentiary hearing without recess and the Board's myopic refusal to grant a continuance so that counsel of petitioner's choice could prepare the defense make a mockery of procedural due process. Their cumulative effect clearly abrogated the principle that a due process hearing "be a real one, not a sham or a pretense." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

Furthermore, the finding of the court below that Dr. Hughes was ably represented at the hearing and that he had shown no prejudice by the claimed due process violations ignores the rule that "it is of no relevance that substitute counsel has not been

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[7] The Court of Appeal below was obviously sensitive to this point since it described the hearing as "quite lengthy," Appendix, p. 7 a, *infra*, rather than candidly stating that it lasted eighteen hours without recess.

shown to have performed incompetently or ineptly. The claimed deprivation is an arbitrary encroachment on the right to counsel of choice not a claim of ineffective assistance rendered in the performance by the substitute counsel." *Gandy v. State of Alabama*, 569 F.2d 1318, 1326 (5th Cir. 1976).

What the Court of Appeal chose to disregard is the fact that Mr. Lemann, who was Dr. Hughes's choice as trial counsel, was unable to participate in the questioning or cross-examination of a single witness because of the Board's refusal to allow him any time to prepare. And the record also establishes that at several points trial counsel fell asleep from exhaustion:

> "MR. DICKINSON [co-counsel for Dr. Hughes]: Can I note for the record that Mr. Lemann keeps falling asleep.
>
> "DR. DE LA HOUSSAYE: [member of the hearing panel]: Well, I wish to hell he'd put the damn cigarette up before he burns me up."

T.H., Vol. V, pp. 483-484.

After eighteen hours, when closing arguments were presented, fatigue had set in:

> "MR. LEMANN: That's all I have to — that's all I feel I'm up to saying at this time because of the lateness of the hour.
>
> "DR. DE LA HOUSSAYE: How late is the hour?
>
> "MR. LEMANN: It is now, Doctor, by my calculations, 20 minutes to 4:00."

T.H., Vol. V, p. 505.

Due process, we submit, condemns forcing lawyers and their clients through eighteen hours of uninterrupted testimony, ending in the fatigue of counsel at 4 o'clock Sunday morning.

CONCLUSION

We are painfully aware that certiorari is reserved for cases of general importance. We submit, however, that certiorari should be granted in this case to guard the principle of fair play between the individual and government. The words of Justice Brandeis, better than any we could write, suggest why the writ should issue in this case: "[I]n the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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January 26, 1987

APPENDIX A

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT
May 12, 1986

No. CA-4589

HOUSTON DAVID HUGHES, D.D.S.
v.
LOUISIANA STATE BOARD OF DENTISTRY

Appeal from the Civil District Court for the Parish of Orleans, Honorable Robert A. Katz, Judge.

Before BARRY, CIACCIO, and LOBRANO, JJ.

Robert L. LOBRANO, Judge:

This appeal arises out of the December 21, 1984 ruling of the Louisiana State Board of Dentistry finding Dr. Houston David Hughes guilty of seven (7) counts of violating LSA R.S. 37:776(10).

On June 20, 1985, the Civil District Court for the Parish of Orleans rendered Judgment affirming the decision of the Louisiana State Board of Dentistry.

FACTS:

On November 16, 1984 the Louisiana State Board of Dentistry (the Board) served a Notice to Show Cause upon Dr. Hous-

ton David Hughes (Dr. Hughes) as to "Why His License Should Not be Suspended, Revoked, Restricted or Limited" as a result of certain violations of Title 37, Section 776 of the Louisiana Revised Statutes.

The first charge alleged that Dr. Hughes permitted two dental assistants[1] to "cement, band and wire" braces on seven patients.[2] It is alleged that this conduct constitutes professional incompetency, the substandard practice of dentistry and the unauthorized practice of dentistry in violation of LSA R.S. 37:776(7)(8) and (10).[3]

The second charge accused Dr. Hughes of engaging in the unauthorized practice of dentistry by allowing five assistants[4] to "cement, band and wire" braces on patients in violation of LSA R.S. 37:776(10).

The third and final charge accuses Dr. Hughes of misrepresenting to the public that he was a specialist in orthodontics in violation of LSA R.S. 37:776(16).[5]

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[1] The two dental assistants were Linda Chenevert and Dannie Downing.

[2] The seven patients were: Joan Marie Chiasson, Jennifer Chiasson, John Chiasson, Shawn Kerr, Sandra O'Quinn, Michelle Hubert and Pamela Jean Burge.

[3] La. R.S. 37:776(7) and (8) respectively authorize the Board to take disciplinary action against a dentist for: "Professional or dental incompetency," and "Continuing or recurring dental practice which fails to satisfy the prevailing acceptable standards of dental practice in this state."

La. R.S. 37:776(10) authorizes the Board to take disciplinary action against a dentist for: "Employing, procuring, inducing, aiding, or abetting a person not licensed or registered as a dentist to engage in the practice of dentistry; but the person practiced upon shall not be an accomplice, employer, procurer, inducer, aider or abetter within the meaning of this provision."

[4] In addition to Chenevert and Downing the assistants were: Theresa Butzow, Diane Boyce and Dorothy McCants.

[5] LSA R.S.37:776(16) authorizes the Board to take disciplinary action against a dentist for "Any conduct intended to deceive or defraud the public."

The Notice to Show Cause emanated from the investigation of complaints from dentists, dental assistants and patients in the greater Baton Rouge area. The Secretary-Treasurer of the Board filed the charges and executed same in the presence of Guy Wooton, Notary Public for the Parish of Orleans, State of Louisiana.

The hearing was set for December 8, 1984, pursuant to LSA R.S. 37:780 and LSA R.S. 37:751 et seq.

Dr. Hughes filed motions to continue, to quash and to produce on or about November 19, 1984. The Board denied these motions.

On December 6, 1984, Dr. Hughes retained additional counsel who filed another motion to continue. The Board denied this motion.

The hearing commenced on December 8, 1984 as scheduled and continued into the early morning hours of December 9, 1984.

On December 21, 1984, the Board rendered its decision together with findings of fact and conclusions of law. The Board dismissed six (6) of the charges for insufficient evidence and found Dr. Hughes guilty of the other seven (7) counts. The Board suspended Dr. Hughes' license for a period of five (5) years on each count to run concurrent and fined him $1000.00 on each count plus costs, fees and expenses incurred in connection with the hearing which it approximated to be $21,346.59 in accordance with LSA R.S. 37:780(B).

Dr. Hughes filed a written request for consideration and rehearing on January 18, 1985 which the Board denied on January 21, 1985.

Dr. Hughes filed a Petition for Judicial Review in the Civil District Court for the Parish of Orleans on February 20, 1985. A

stay order was issued preventing the Board from implementing its decision until further orders.

On June 28, 1985, the Civil District Court rendered judgment affirming the Board's decision. From this judgment, Dr. Hughes appeals asserting the following specifications of error.

1) The lower court committed reversible error in not finding that the manner in which the disciplinary proceeding was conducted violated due process of law.
2) The lower court committed reversible error in the manner in which it reviewed the administrative proceedings.
3) The lower court committed reversible error in not finding that the Board committed an error of law in denying the motion to dismiss on the ground of multiplicity.
4) The lower court committed reversible error in not finding that the Board committed manifest error in adjudicating responsibility for the conduct alleged in Charge II, Specification 5.
5) The lower court committed reversible error in not finding that the Board acted arbitrarily in imposing an excessive and disproportionate sanction in the case.

SPECIFICATION OF ERROR 1:

Dr. Hughes asserts that the manner in which the proceeding was conducted violated his due process rights because the Board: (1) failed to comply with the statutory mandate by charging Dr. Hughes in an unsworn complaint; (2) failed to grant Dr. Hughes a continuance; (3) failed to provide adequate discovery; and (4) failed to grant an overnight recess.

Pursuant to LSA R.S. 37:779[6] the charges made against Dr.

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[6] "All charges against a dentist or a dental hygienist under R.S. 37:776 or

Hughes must be made under oath.

A review of the record indicates that this error was raised for the first time by Dr. Hughes in his brief before the lower court. Dr. Hughes did not complain of the lack of a jurat on the complaint prior to the hearing or as part of the motion for reconsideration and rehearing. Furthermore, LSA R.S. 49:964(G) provides that in the judicial review of an adjudication proceeding the court may reverse the decision of the agency "if substantial rights of the appellant have been prejudiced." The technical defect complained of does not warrant a reversal of the Board's decision. Dr. Hughes was adequately informed of the charges against him. He was afforded a complete and unrestricted opportunity to present evidence in his behalf before the Board, he was represented by counsel, he was afforded confrontation and the right of cross-examination as to all adverse witnesses. He took a timely appeal for judicial review with full knowledge of the Board's decision as well as its findings of fact and conclusions of law. *Durousseau v. Louisiana State Racing Commission*, 399 So.2d 1288 (La. App. 4th Cir. 1981). While it is true that the charges made by the Board do not contain a jurat executed before a Notary, this technical

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37:777 for violations of this Chapter *shall be made under oath* either by the secretary-treasurer, a duly authorized inspector, a member of the Board, or any citizen, and submitted to the president of the Board, who, unless for good and sufficient cause shown by his written reasons, shall appoint a committee of three or more members of the board besides himself to hear the charge. A member of the board making the charge shall be ineligible to sit as a member of the committee. The president shall designate the time and place of the hearing.

Where the charge is made by a citizen, he should state the sources of his information and the grounds of his belief, and the secretary, a member, an inspector, or an agent of the board shall substantiate the charge by determining that the citizen is informed and believes that the charge is true." (Emphasis added).

defect does not obscure the fact that such charges in fact were made under oath before a notary public, Guy Wooton. The mere lack of a written manifestation that the charges were brought under oath is not to be confused with the fact that the charges were brought under oath. We do not find that this technical defect in any way served to deprive Dr. Hughes of any substantial due process rights.

LSA R.S. 37:780(A) provides for notice at least twenty (20) days before the time fixed for the hearing. The record clearly reflects that such notice was given to Dr. Hughes. The record adequately reflects that counsel for Dr. Hughes was retained even before charges were formally filed and had contacted the Board's Special Counsel in this regard. None of the charges filed by the Board came as a surprise to Dr. Hughes. Dr. Hughes has made no showing of substantial prejudice by the Board's refusal to grant him a continuance.

Similarly, Dr. Hughes alleges that he was denied adequate opportunity for discovery. The record fails to establish that Dr. Hughes was in any way prejudiced. He argues circumstantially that his rights were prejudiced but fails to show any actual prejudice. There is nothing in the record to substantiate Dr. Hughes's allegations that bad faith actions by the Board prevented him from taking depositions within the time frame allowed by law. Dorothy McCants and Doris Covington, the two witnesses Dr. Hughes claims he had a right to depose, testified at the hearing. Dr. Hughes was given complete opportunity to cross-examine these witnesses. Thus, we find no prejudice in Dr. Hughes being unable to depose these witnesses prior to the hearing.

Finally, Dr. Hughes alleges that the Board abused its discretion by not granting an overnight recess.

Although the hearing was quite lengthy such did not serve to deny Dr. Hughes his right to present his defense and cross-examine his accusers. Again Dr. Hughes fails to show where he suffered substantial prejudice by the length of the hearing. The record clearly reveals that everyone concerned with the hearing was subjected to the same environment and conditions. Dr. Hughes was represented by three very able defense counsel who vigorously cross-examined the witnesses against him and nothing in the record shows that they were unable to function satisfactorily because of the length of the proceeding. Dr. Hughes fails to show this Court how he was prejudiced because of the failure to adjourn the hearing until the next day. There is no showing made that the proof or the outcome would have been different if there had been a recess.

This specification of error is without merit.

SPECIFICATION OF ERROR 2:

Dr. Hughes asserts that the lower court, in reviewing the decision of the Board, placed itself in the position of an appellate court rather than a supervisory agency. In support of this assertion, Dr. Hughes cites language in the lower court's reasons for judgment (such as "appellant's brief," "motion to quash or other kind of exception") which, Dr. Hughes claims, serves to substantiate his allegations of improper review. We disagree. Notwithstanding the language used by the trial court in its reasons for judgment, the scope of the review is limited to a determination of whether the ruling was unreasonable, arbitrary or capricious or amounted to an abuse of discretion. *Delta Bank and Trust Co. v. Lassiter*, 383 So.2d 330 (La. 1980). Furthermore, courts should be cognizant of the very strong presumption of validity and propriety in such an administrative action where casting judgment upon the professional behavior

of a fellow member of a profession is a matter peculiarly within the expertise of an agency composed of members of that profession. *Wilcox v. Louisiana State Board of Medical Examiners*, 446 So.2d 502 (La. App. 4th Cir. 1984), writ denied, 450 So.2d 359; *Fisher v. Louisiana State Board of Medical Examiners*, 352 So.2d 729 (La. App. 4th Cir. 1977), writ denied, 353 So.2d 1338 (La. 1978). We find no procedural error in the trial court's review of the hearing before the Board.

This specification of error is without merit.

SPECIFICATION OF ERROR 3:

Dr. Hughes asserts that the Board abused its discretion in denying his motion to dismiss certain of the charges on the grounds of multiplicity. That is, he was found guilty of violations that were duplicated in the various charges.

We have reviewed each charge and specification where a violation was found. Summarizing, they are as follows:

Charge 1 violations are all based on La. R.S. 37:776(10). See *ftnote 3, supra.* In Specification 3 a violation occurred because of unauthorized orthodontic work performed by dental assistant Linda Chenevert upon Sandra O'Quinn. In Specification 5, violation occurred because of unauthorized orthodontic work performed by dental assistant Linda Chenevert to Michelle Hubert. In Specification 7, a violation occurred because of unauthorized orthodontic work performed by Dannie Downing to Pamela Jean Burge.

Charge II violations are also all based on La. R.S. 37:776(10). In Specification 1 a violation occurred because of unauthorized orthodontic work performed by dental assistant Dorothy McCants on unnamed patients. In Specification 2, a violation occurred because of unauthorized orthodontic work performed by dental assistant Linda Chenevert on Jennifer Chiasson,

Sandra O'Quinn and Michelle Hubert. In Specification 3, a violation occurred because of unauthorized orthodontic work performed by dental assistant Dannie Downing to Pamela Jean Burge and Michelle Hubert. In Specification 5, a violation occurred because of unauthorized orthodontic work performed by dental assistant Diane Fisher Boyce on unnamed patients.

Clearly, the violations of Charge II, Specification 2 involve the same dental assistant, and the two patients involved in Charge 1, Specifications 3 and 5. Furthermore the violations of Charge II, Specification 3 involve the same dental assistant and the patient involved in Charge 1, Specification 7. Since all were held to be violations of La. R.S. 37:776(10), we find that Charge 1, Specifications 3, 5 and 7 are duplications of the violations in Charge II, Specifications 2 and 3. We therefore reverse the violations found in Charge I, Specifications 3, 5 and 7.

SPECIFICATION OF ERROR 4:

Dr. Hughes asserts that the Board committed manifest error in adjudicating responsibility for the conduct alleged in Charge II, Specification 5 — which states:

> "In that he did with full knowledge and intent employ, procure, induce, aid or abet Ms. Diane Boyce (a person not licensed or registered as a dentist in Louisiana) to *engage in the practice of dentistry in his dental offices;* specifically, Ms. Boyce *provided orthodontic services* (including cementing, banding and wiring) to numerous patients, all of which is a cause for the revocation, suspension, limitation or restriction of the license to practice dentistry in Louisiana of the aforesaid Dr. Houston David Hughes." (emphasis added).

In response to that charge the Board found that Ms. Diane Fisher Boyce placed and removed ligatures while in the employ of Dr. Hughes for a period of nine years. This was done during a period prior to 1982 when the regulations prohibited such work by dental assistants. The Board held that these procedures were unauthorized at the time performed.

Dr. Hughes asserts that the Board never charged that he allowed Ms. Boyce to remove ligatures, therefore the finding is inconsistent with the charge. We disagree. The language of the charge is not so restrictive as to disallow this holding.

Dr. Hughes also argues that since the placement of ligatures is now authorized by the regulations, he should not be punished for something that the Board currently recognizes as acceptable. We have reviewed the evidence, and it substantiates the finding of the Board with respect to the placement of ligatures. We will not disturb that finding because the Board saw fit to change its regulations in 1982. The Board is composed of persons learned in the dentistry profession and we will not substitute our judgment for theirs in determining what procedures should be performed by a licensed dentist.

SPECIFICATION OF ERROR 5:

Dr. Hughes asserts that the Board acted arbitrarily in imposing an excessive and disproportionate sanction in this case. Dr. Hughes complains that another dentist found in violation of LSA R.S. 37:776(10) received a twenty-one (21) day suspension and a $500 fine and was placed on two (2) years probation. Dr. Hughes suggests that he is not being punished for the conduct charged but because of the economic threat his Denta-Care program poses to traditional dentistry. We find no merit in this assertion. In *Sturrock v. Louisiana State Racing Commission*, 437 So.2d 357 (La. App. 4th Cir. 1983) this court

stated: "In any event, the mere circumstances that a lesser penalty has been imposed in one other case . . . does not amount to a showing that defendant's penalizing of plaintiff was 'arbitrary or capricious or abuse of discretion or clearly unwarranted exercise of discretion." *Id. at 358.* Considering the number of violations, the length of time over which they occurred and the serious nature of the charges we find the penalty imposed by the Board was appropriate and justified.

For the foregoing reasons the judgment of the lower court affirming the decision of the Louisiana State Board of Dentistry with respect to the violations found in Charge II, Specifications 1, 2, 3 and 5 is affirmed. The violations and penalties, found in Charge I, Specifications 3, 5 and 7 are reversed.

AFFIRMED IN PART, REVERSED IN PART AND RENDERED.

APPENDIX B

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "B"

NO. 85-2806

HOUSTON DAVID HUGHES, D.D.S.
VS.
LOUISIANA STATE BOARD OF DENTISTRY

JUDGMENT ON PETITION FOR JUDICIAL REVIEW

The petition for judicial review filed on behalf of Houston David Hughes, D.D.S., was heard on June 21, 1985, and was taken under advisement.

Present: Arthur A. Lemmon [sic], III, Esq., and Frank H. Dickinson, III, Esq., attorneys for and [sic] Houston David Hughes, D.D.S.;
Guy Wooten, Esq., attorney for Louisiana State Board of Dentistry.

After considering the petition, the transcript of the administrative hearing by the Louisiana State Board of Dentistry, the memoranda, the exhibits, argument of counsel and the law and for the written reasons assigned,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Louisiana State Board of

Dentistry rendered on December 21, 1984, be and the same is hereby affirmed;

IT IS FURTHER ORDERED that the stay order issued herein on February 20, 1985, be and the same is hereby recalled and set aside;

IT IS FURTHER ORDERED that a stay order issue herein directing the Louisiana State Board of Dentistry not to implement its decision of December 21, 1984 until July 16, 1985 at 1:00 P.M., for the purpose of giving the petitioner Houston David Hughes the opportunity to apply to the Court of Appeal, Fourth Circuit for a stay order beyond the time specified herein.

New Orleans, Louisiana, this 28th day of June, 1985.

/s/ ROBERT A. KATZ, Judge

REASONS FOR JUDGMENT

The Court assigns the following reasons for judgment:

The Louisiana State Board of Dentistry commenced administrative proceedings against Houston David Hughes, D.D.S., on November 16, 1984, by filing a notice to show cause why his license should not be suspended or revoked for the reasons set forth in an attached listing of specifications numbering thirteen.

The rule to show cause was set for December 8, 1984, in Baton Rouge at the Sheraton Hotel, pursuant to RS 37:780 and the other applicable provisions of Title 37 Section 751 et seq.

Dr. Hughes initially retained Mr. Frank H. Dickinson, III, as his counsel of record who then proceeded to file a motion for continuance, a motion to quash and a motion to produce on or

about November 19, 1984. The dentistry board denied motions for continuance and to quash on or about November 26, 1984.

On December 6, 1984, Dr. Hughes also retained Arthur A. Lemmon [sic], III, as additional counsel of record on his behalf. Mr. Lemmon [sic] then filed a motion for continuance on December 6, 1984 requesting that the hearing set for December 8 be continued. This motion for continuance was denied.

On December 8, the hearing commenced and proceeded into the early morning hours of December 9, 1984.

On December 21, 1984, the board rendered its decision together with its findings of fact and conclusions of law. The board dismissed six of the charges for insufficient evidence and found Dr. Hughes guilty of the other seven violations. The board imposed a $1,000.00 fine for each of the seven violations of law and also suspended Dr. Hughes' license for a period of five years for each charge, the suspensions to run concurrently. The board also ordered Dr. Hughes to reimburse the board for the costs, fees and expenses incurred in connection with the hearing which it approximated the sum to be $21,346.59, such assessment in accordance with RS 37:780 B.

Dr. Hughes filed a written request for a reconsideration and rehearing on January 18, 1985, which was denied on January 21, 1985.

The petition for judicial review to this Court was filed on February 20, 1985, and a stay order was issued preventing the State Board of Dentistry from implementing its decision until further orders of this Court.

In his brief appellant lists seven specification of errors as a basis for reversal of the board's decision.

The first specification of error is that the charges were not made under oath as required by RS 37:779.

This is not disputed by the dentistry board.

However, a review of the record shows that this error was raised for the first time in the appellant's brief. There was no motion to quash filed or other kind of exception prior to the hearing nor as part of the motion for reconsideration and rehearing. On these grounds alone the Court could reasonably conclude that the raising of this issue at this time is untimely. However, notwithstanding this the Court resolves the argument in accordance with the decision reached by the Fourth Circuit in Durousseau v. Louisiana State Racing Commission, 399 So. 2d 1288 (1981). In that decision the trial Court reversed the commission decision on a technicality that the decision of the commission was not reduced to writing as required by RS 4:154(F) within a forty-eight hour period. The Court of Appeal reversed the trial Court and reinstated the commission decision holding that a technical violation did not warrant a reversal of the commission decision unless it violated substantial rights of the applicant.

Accordingly, this Court concludes that the substantial rights of the appellant have not been prejudiced by the failure of the Board of Dentistry to file the charges under oath.

Specification of errors 2, 3 and 4 will be discussed together. They deal with an alleged abuse of discretion on behalf of the Board of Dentistry for denying the request for a continuance of the hearing, in failing to provide adequate opportunity for discovery and in failing to grant an overnight recess.

RS 37:780(A) provides for notice at least twenty days before the time fixed for the hearing. Such notice was given to the appellant and when the motion for continuance was denied on November 26, 1984, there were no writs taken by the appellant. Furthermore, there has been no showing in the record that the appellant has been prejudiced by the failure of the board to grant a continuance.

Similarly, the appellant alleges that he has been denied an adequate opportunity for discovery but the record fails to establish that he has in fact been prejudiced. At most the appellant suggests circumstantially that his rights have been prejudiced but there has been no actual showing of prejudice.

Next, the appellant alleges that the board abused its discretion by not granting an overnight recess at the hearing.

It is true that it would have been preferable for the board to have done this; however, based on the record this Court cannot reasonably conclude that the appellant has been prejudiced in this respect. In fact, the board dismissed six of the charges for failure of adequate evidence.

The appellant next alleges as specification of error that the Board of Dentistry abused its discretion in denying the motion to dismiss on the ground that some specifications of wrongdoing were multiplicitous.

Even if this were so, this is not basis for remanding the case for a new trial.

Accordingly, this Court does not find merit to this specification of error.

With respect to the specification of error number 6 the Court finds that there is likewise no merit to this alleged specification.

Finally, appellant alleges that specification of error number 7 that the board abused its discretion in failing to produce prior sanctions imposed in similar cases and in imposing an excessive and disproportionate sanction in this case.

Appellant in brief at page 14 does state that he was able to attain a summary of sanctions imposed by the board during the period of 1979 through 1984. However, it is not clear how this summary was obtained. Nevertheless, this would make moot the argument that the board failed to produce the result of sanctions in similar cases.

This Court rejects the argument that the sanctions imposed in this case are excessive and disproportionate from prior sanctions.

In Sturrock v. Louisiana State Racing Commission, 437 So. So.2d 357-(1983) the Fourth Circuit stated that: "In any event, the mere circumstance that a lesser penalty has been imposed . . . does not amount to a showing that defendant's penalizing of plaintiff was arbitrary or capricious or abuse of discretion or clearly unwarranted exercise of discretion." See RS 49:964(G)(5).

Accordingly, after a review of the summary of prior sanctions imposed this Court concludes that there has not been a showing by the appellant that the sanctions imposed in this case are excessive and disproportionate or that the board has abused its discretion.

For the foregoing reason the Court affirms the decision of the Louisiana State Board of Dentistry but issues a stay order for the time set forth in the judgment so that the appellant may apply to the Court of Appeal, Fourth Circuit for a stay order beyond the time specified in the judgment.

New Orleans, Louisiana, this 28th day of June, 1985.

/s/ ROBERT A. KATZ, Judge

APPENDIX C

LOUISIANA STATE BOARD OF DENTISTRY

FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION
No. 84-2381

IN RE HOUSTON DAVID HUGHES, D.D.S.

The administrative hearing in the above captioned matter was held on December 8 and 9, 1984, in Baton Rouge, Louisiana, pursuant to a Rule to Show Cause and Specifications served upon Dr. Hughes on November 16, 1984. The specifications were served in accordance with the provisions of R.S. 37:780 under the authority granted to the Board by R.S. 37:760(4). Those members of the Board who had been appointed to the Committee and were in attendance were Dr. Bill F. Kalpakis (President), Dr. F. Ralph Dauterive, Dr. Lionel L. de la Houssaye, Dr. Russell R. DiMarco, Dr. Bennett P. Fontenot, Dr. Ralph B. King, Jr., Dr. Joseph M. Kochansky, and Dr. N. Francis Laborde. Dr. Kalpakis served as Chairman of the Board/Committee but did not participate in the deliberations of the Board/Committee. Also in attendance at the December 8, 1984 hearing were Dr. Houston David Hughes and his three attorneys (Mr. Arthur A. Lemann, III, Mr. Frank H. Dickinson, III and Mr. Steven Irving), as well as Guy Wootan, Special Counsel to the State Board, and Mr. John M. Gallagher, Jr., of Mr. Wootan's law office. The hearing was transcribed by a court reporter.

The hearing was first conducted as an open hearing but before the first witness was sworn, it was conducted in Executive Session at the request of Dr. Hughes's three attorneys. All witnesses were sequestered prior to their testimony by Dr. Kalpakis, Chairman.

The Board/Committee heard testimony at the December 8, 1984 hearing from Dr. Houston David Hughes, Mrs. Dorothy McCants, Dr. James F. Fruge, Miss Jennifer Chiasson, Mrs. Dana A. Tate, Miss JoAnne Chiasson, Miss Joan Marie Chiasson, Dr. Thomas Kiebach, Miss Sandy O'Quinn, Mr. John Chiasson, Dr. Rick L. Martin, Miss Pamela Jean Burge, Mrs. Doris Covington, Miss Michelle Hubert, Ms. Linda Chenevert, Dr. Jan Hanvey, Dr. Dennis Cuendet, Ms. Diane Fisher Boyce, Mrs. Dixiana Faye Carlin, Mr. Bobby Hunt, Miss Ann Welsh, Miss Tammy Bullard and Mrs. Susan B. Dew. The Board/Committee also received into the record certain exhibits that were offered by the attorneys for each of the parties.

During the course of the hearing, all of the witnesses were questioned by the attorneys for both parties as well as the individual members of the Board/Committee. At the conclusion of the hearing, the Board/Committee deliberated and reviewed each of the charges and specifications in line with the testimony and evidence introduced at the hearing and voted on each charge. The decision of the Board/Committee was that the evidence and testimony sustained a finding that Dr. Hughes had violated seven (7) of the charges served upon him on November 16, 1984 and the penalty authorized by R.S. 37:780 was adopted by the Board/Committee and announced to those present, including Dr. Hughes and his three attorneys.

The charges and specifications served upon Dr. Hughes dealt with seven (7) alleged violations of R.S. 37:776(7, 8 and 10); and

five alleged violations of R.S. 37:776(10); and one alleged violation of R.S. 37:776(16).

CHARGE I, SPECIFICATION 1

The Board/Committee heard the testimony of Miss Joan Marie Chiasson, who stated that she thought that Linda Chenevert, a dental assistant, did cementing and banding on her braces in the year 1978; however, later testimony disclosed that Ms. Chenevert was not employed by Dr. Hughes in 1978. Accordingly, upon conclusion of the case, Dr. Hughes' attorneys moved that this particular specification be dismissed as Ms. Chenevert was not employed by Dr. Hughes in 1978.

CHARGE I, SPECIFICATION 2

Because of the volume of witnesses and length of the hearing, counsel for the State Board of Dentistry elected not to call Mr. Shawn Kerr. Counsel for Dr. Hughes were given the opportunity to call Mr. Kerr for cross examination but elected not to do so. Accordingly, upon the conclusion of the case, counsel for Dr. Hughes moved that this particular specification be dismissed.

CHARGE I, SPECIFICATION 3

The Board/Committee heard the testimony of Miss Sandra O'Quinn who stated that she was 17 years of age when she began seeing Dr. David Hughes in February of 1982. Thereafter, on or about May 4, 1983, Linda Chenevert, a dental assistant, took approximately 4 to 5 hours to band her teeth and in the course of doing so, was looking at an instructional sheet covering lingual braces. In the course of Ms. Chenevert performing these dental functions, Dr. Hughes came in and out of the room but did not perform any of the orthodontic services whatsoever. Miss O'Quinn further testified that on subsequent visits, she was also treated by Ms. Chenevert including the

placement of an archwire in her mouth and later, when the archwires were protruding in the back of her mouth, Linda Chenevert cut same. Later, Miss O'Quinn went to Dr. Rick Martin for orthodontic treatment, who later testified that he performed all orthodontic services on her. Subsequently, Dr. Rick Martin, qualified as both an expert and fact witness, also testified that he examined Miss O'Quinn on May 7, 1984, and found a couple of bands missing and that the bands previously cemented were of a low quality basis. Further, Miss O'Quinn's upper teeth were not well aligned. Dr. Hughes testified on cross examination that he performed all orthodontic treatment on Miss O'Quinn.

CHARGE I, SPECIFICATION 4

The Board/Committee heard the testimony of Miss Jennifer Chiasson who stated that she first went to see Dr. Hughes in September of 1981 and in February, 1982, had her orthodontic braces put on by Linda Chenevert, a dental assistant to Dr. Hughes. Miss Chiasson further testified that she only saw Dr. Hughes after her braces had been put on by Ms. Chenevert. Dr. Hughes was never there while work was being performed on Miss Chiasson by a dental assistant. However, following the close of the case, counsel for Dr. Hughes moved that this specification be struck and/or dismissed since the allegation in the charges recited the 1978, at which time Ms. Chenevert was not employed by Dr. Hughes. Counsel for the State Board argued that this was a typographical error and that it did not prejudice Dr. Hughes in any way since he had all records on the patients and the Board did not have access to this information until the hearing commenced and a return was obtained on the subpoena duces tecum served on Dr. Hughes.

CHARGE I, SPECIFICATION 5

The Board/Committee heard the testimony of Miss Michelle Hubert who testified that she first saw Dr. Hughes on January 23, 1984 and on April 3, 1984, had her orthodontic braces put on by Linda Chenevert, dental assistant to Dr. Hughes. Miss Hubert further testified that while Ms. Chenevert was placing the braces on her teeth, Dr. Hughes was not in the dental offices. Miss Hubert kept referring to her diary in order to refresh her memory and stated further that once when one of the bands came loose, either Linda Chenevert or Dannie Downing recemented the loose band in her mouth. Further, on May 7, 1984, two pads (bands) came loose and were recemented by Linda Chenevert and/or Dannie Downing. On May 15, 1984 Miss Hubert went into the offices to have her wires changed and Dannie Downing proceeded to do so. Miss Hubert testified that she became very unhappy with the orthodontic results and changed to an orthodontist, Dr. James Fruge, who put on new braces himself. Miss Hubert testified that Dr. Fruge performed the same services in the installation of the braces as formerly was done by Linda Chenevert and/or Dannie Downing, dental assistants in the office of Dr. Hughes. Dr. Hughes and Ms. Chenevert testified that Dr. Hughes had done all the work on Michelle Hubert.

CHARGE I, SPECIFICATION 6

The Board/Committee heard the testimony of John Chiasson, age 16 years of age when he first saw Dr. Hughes for orthodontic treatment in February of 1982. Mr. Chiasson testified that he only saw Dr. Hughes on 30% of his visits to the offices. The balance of the time, he was seen and treated by dental assistants instead of Dr. Hughes. Following the conclusion of the case, counsel for Dr. Hughes moved that this specifi-

cation be struck and/or dismissed as the charges recited the year 1978 and at that time, Ms. Chenevert was not employed by Dr. Hughes. Again, counsel for the State Board argued that this was a typographical error and that it did not prejudice Dr. Hughes in any way as he had all patient records and was fully aware of the dates and times of treatment whereas the State Board did not have this information available and had to rely on the memory of the various witnesses and/or former patients of Dr. Hughes.

CHARGE I, SPECIFICATION 7

The Board/Committee heard the testimony of Miss Pamela Jean Burge, who stated under oath that Dannie Downing, a dental assistant in Dr. Hughes's office, in July, 1984, did all cementing, banding and wiring and performed other dental procedures in extending orthodontic treatment to her. Thereafter, bands came loose from time to time and Miss Burge would return to Dr. Hughes's office and have the bands recemented and/or replaced by Dannie Downing. Later, her mother, Mrs. Doris Covington, testified in the hearing that Ms. Dannie Downing informed her that she had placed the braces in Pamela Burge's mouth because she was very qualified as a dental assistant to do so in light of her 4 to 5 years of experience. Moreover, Dannie Downing informed Mrs. Covington that she was very familiar with Pam's history and admitted putting the braces in Pam's mouth. Mrs. Covington also testified that when she first met with Dr. Hughes about the orthodontic treatment to her daughter, Dr. Hughes informed her that he was an orthodontist and would do all the work himself. Pamela Jean Burge and Mrs. Doris Covington testified that after discovering that Dannie Downing had done the orthodontic work on Pamela improperly, they both elected to see

another dentist for orthodontic treatment and ultimately went to Dr. E. D. Bateman, Jr., an orthodontist. Miss Burge further testified that Dr. Bateman did all orthodontic work himself unlike the practices in Dr. Hughes's office where dental assistants performed the same functions. Dr. Hughes testified that he had done all work on Pamela.

CHARGE II, SPECIFICATION 1

Mrs. Dorothy McCants testified at the hearing that she had worked for Dr. Hughes for approximately 2 weeks in May of 1984 as a dental assistant. During that period of time, she had worked on various orthodontic patients and had removed archwires, cemented bands, took impressions, and assisted in the placing of braces on various patients in the orthodontic section of Dr. Hughes's office, without supervision of Dr. Hughes or any other licensed dentist. She further testified that she observed Dannie Downing and Linda Chenevert perform unauthorized and unsupervised dental treatments on many patients without Dr. Hughes being present. She later went to work for Dr. McDavit and stated that she did not do the same things on patients for Dr. McDavit that she had done for Dr. Hughes. Dr. Hughes on cross examination denied the testimony of Mrs. McCants.

CHARGE II, SPECIFICATION 2

Jennifer Chiasson, Joan Marie Chiasson, Sandra O'Quinn, and Michelle Hubert testified under oath that Linda Chenevert, a dental assistant, provided orthodontic services to each, including cementing, banding and wiring from time to time. Ms. Chenevert testified for the defense and stated that she started working for Dr. Hughes in 1980 as a dental assistant but stated that she did not perform any of the functions accused of

by the witnesses for the board and the prosecution of the hearing. Dr. Hughes, in his testimony, also denied the testimony of his former patients.

CHARGE II, SPECIFICATION 3

Mrs. Dorothy McCants, Pamela Jean Burge, and Mrs. Doris Covington testified that they either saw Dannie Downing, a dental assistant of Dr. Hughes, provide orthodontic services to various patients, including cementing, banding and wiring. Ms. Downing was not available to testify and Dr. Hughes on both cross and direct examination testified that Ms. Downing did not do this type of work on orthodontic patients.

CHARGE II, SPECIFICATION 4

Ms. Theresa Butzow did not testify and several witnesses for the State Board could not name Ms. Butzow adequately, even though they described her physical appearance, and consequently at the conclusion of the case, counsel for Dr. Hughes moved that this specification be struck and/or dismissed. Counsel for the State Board joined in the request to the Board.

CHARGE II, SPECIFICATION 5

Miss Joan Marie Chiasson testified at the hearing she went to Dr. Hughes in January of 1978 and his dental assistant did all cementing and banding work on her. Later, Ms. Diane Fisher Boyce testified she now worked for Dr. Carl K. Girod, but formerly worked for Dr. Hughes for nine years from January of 1973 to 1982, as a dental assistant in the orthodontic section. Ms. Boyce further testified that Linda Chenevert began working a year or two before she left Dr. Hughes's employ. Ms. Boyce also testified she performed placing and removing of ligatures, festooning and fitting of bands, all before the rules and regulations of the State Board of Dentistry pertaining to

the authorized duties of a dental assistant were changed recently.

CHARGE III, SPECIFICATION 1

Since the testimony of Mrs. Dorothy McCants did not include the fact that she had heard or witnessed Dr. Hughes informing patients that he was an orthodontic specialist, upon conclusion of the case, counsel for Dr. Hughes moved that this particular specification be dismissed.

CONCLUSIONS OF LAW:

The provisions of Section 776 of Title 37 of the Louisiana Revised Statutes enumerates the causes for which a Committee of the Board appointed to hear formal complaints against a licensed dentist may act with regard to the license of such dentist.

Sub-section (10) of that section provides as follows:

> "(10) Employing, procuring, inducing, aiding, or abetting a person not licensed or registered as a dentist to engage in the practice of dentistry; but the person practiced upon shall not be an accomplice, employer, procurer, inducer, aider, or abetter within the meaning of this provision."

The Board/Committee finds with regard to Charge I, Specification 1, that Linda Chenevert was not employed in 1978 by Dr. Hughes and consequently dismisses said Specification.

The Board/Committee finds with regard to Charge I, Specification 2, that since Shawn Kerr did not testify, there was insufficient evidence and accordingly, dismisses said Specification against Dr. Hughes.

The Board/Committee finds with regard to Charge I, Specification 3, that Linda Chenevert, an unlicensed dental assistant employed by Dr. David Hughes, under his direction, did per-

form cementing, banding and wire functions upon Sandra O'Quinn. The Board/Committee finds that these procedures are not authorized duties permitted to be performed by an unlicensed person and that it can only be performed by a licensed dentist. Thus the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge I, Specification 4, that Linda Chenevert was not employed by Dr. Hughes in the year 1978 and because of insufficient evidence linking a particular dental assistant, the Board/Committee dismisses said Specification against Dr. Hughes.

The Board/Committee finds with regard to Charge I, Specification 5, that Linda Chenevert, an unlicensed dental assistant employed by Dr. David Hughes, under his direction, did perform cementing, banding and wire functions upon Michelle Hubert. The Board/Committee finds that these procedures are not authorized duties permitted to be performed by an unlicensed person and that it can only be performed by a licensed dentist. Thus the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge I, Specification 6, that Linda Chenevert did not work for Dr. Hughes in the year 1978 and because of the inability of John Chiasson to fully identify the dental assistant involved, it will dismiss this Specification against Dr. Hughes.

The Board/Committee finds with regard to Charge I, Specification 7, that Dannie Downing, an unlicensed dental assistant employed by Dr. David Hughes, under his direction, did perform cementing, banding and wire functions upon Pamela Jean Burge. The Board/Committee finds that these procedures are

not authorized duties permitted to be performed by an unlicensed person and that it can only be performed by a licensed dentist. Thus the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge II, Specification 1, that Mrs. Dorothy McCants, an unlicensed dental assistant employed by Dr. David Hughes under his direction did perform orthodontic services, including cementing and banding upon orthodontic patients. The Board/Committee finds that these procedures are not authorized duties permitted to be performed by an unlicensed person and that it can be performed only by a licensed dentist. Thus, the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge II, Specification 2, that a number of witnesses testified that they received orthodontic treatment from Linda Chenevert, an unlicensed dental assistant employed by Dr. David Hughes under his direction, and said Ms. Chenevert did perform cementing, banding and wiring of various patients, namely, Jennifer Chiasson, Sandra O'Quinn, and Michelle Hubert. The Board/Committee finds that these procedures are not authorized duties to be performed by an unlicensed person and that it can be performed only by a licensed dentist. Thus, the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge II, Specification 3, that a number of witnesses testified that they received orthodontic treatment from Dannie Downing, an unlicensed dental assistant employed by Dr. David Hughes under his direction, and said Ms. Downing did perform cement-

ing, banding and wiring on various patients, namely, Pamela Jean Burge and Michelle Hubert. The Board/Committee finds that these procedures are not authorized duties to be performed by an unlicensed person and that same can be performed only by a licensed dentist. Thus, the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge II, Specification 4, the testimony and evidence presented at the hearing was insufficient and consequently, dismisses this Specification against Dr. Hughes.

The Board/Committee finds with regard to Charge II, Specification 5, that Ms. Diane Fisher Boyce testified that she placed and removed ligatures while formerly in the employ of Dr. Hughes for a period of nine years and before the rules and regulations pertaining to the authorized duties of a dental assistant were changed by the Louisiana State Board of Dentistry recently. Ms. Boyce further testified that she was an unlicensed dental assistant employed by Dr. Hughes and under his direction did perform said orthodontic services to various patients. In addition, Joan Marie Chiasson testified that in 1978, the dental assistants for Dr. Hughes did all cementing and banding of the appliance placed in her mouth. The Board/Committee finds that these procedures were unauthorized at the time performed and do not consist of authorized duties permitted to be performed by an unlicensed person in that it can be performed only by a licensed dentist. Thus, the Board/Committee finds that Dr. Hughes did violate the provisions of R.S. 37:776(10) in regard to this matter.

The Board/Committee finds with regard to Charge III, Specification 1, that insufficient evidence was presented at the

hearing to sustain same and consequently, said Specification is dismissed against Dr. Hughes.

DECISION OF THE COMMITTEE:

The Decision of the Board/Committee was orally given to Dr. Houston David Hughes and his three attorneys, Mr. Lemann, Mr. Dickinson and Mr. Irving on December 9, 1984. The decision rendered is as follows:

IT IS ORDERED, that on each of the seven violations of the Louisiana Statute (R.S. 37:776) which the Board/Committee found that Dr. Hughes had committed, the license to practice dentistry of Dr. Houston David Hughes is hereby suspended for a period of five years with each period of suspension to be concurrent with the other.

IT IS FURTHER ORDERED, that Dr. Houston David Hughes is fined $1,000.00 for each of the seven violations for a total fine of $7,000.00 and that he shall reimburse the State Board for all costs, fees, expenses, stenographic fees, attorney fees, and all other charges for the proceedings as provided by law (it is approximated that at least $21,346.59 will be due).

These Findings of Fact, Conclusions of Law and Decision are dated December 21, 1984.

/s/ DR. F. RALPH DAUTERIVE,
Committee Member

/s/ DR. LIONEL L. de la HOUSSAYE,
Committee Member

/s/ DR. RUSSELL R. DiMARCO,
Committee Member

/s/ DR. BENNETT P. FONTENOT,
Committee Member

/s/ DR. RALPH B. KING, JR.,
Committee Member

/s/ DR. JOSEPH M. KOCHANSKY,
Committee Member

/s/ DR. N. FRANCIS LABORDE,
Committee Member

ATTEST:
/s/ SUSAN B. DEW,
Secretary-Treasurer
Louisiana State Board
of Dentistry

Supreme Court, U.S.
FILED
MAR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1245

In the Supreme Court of the United States

OCTOBER TERM, 1986

HOUSTON DAVID HUGHES, D.D.S.,
Petitioner

VERSUS

LOUISIANA STATE BOARD OF DENTISTRY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF LOUISIANA,
FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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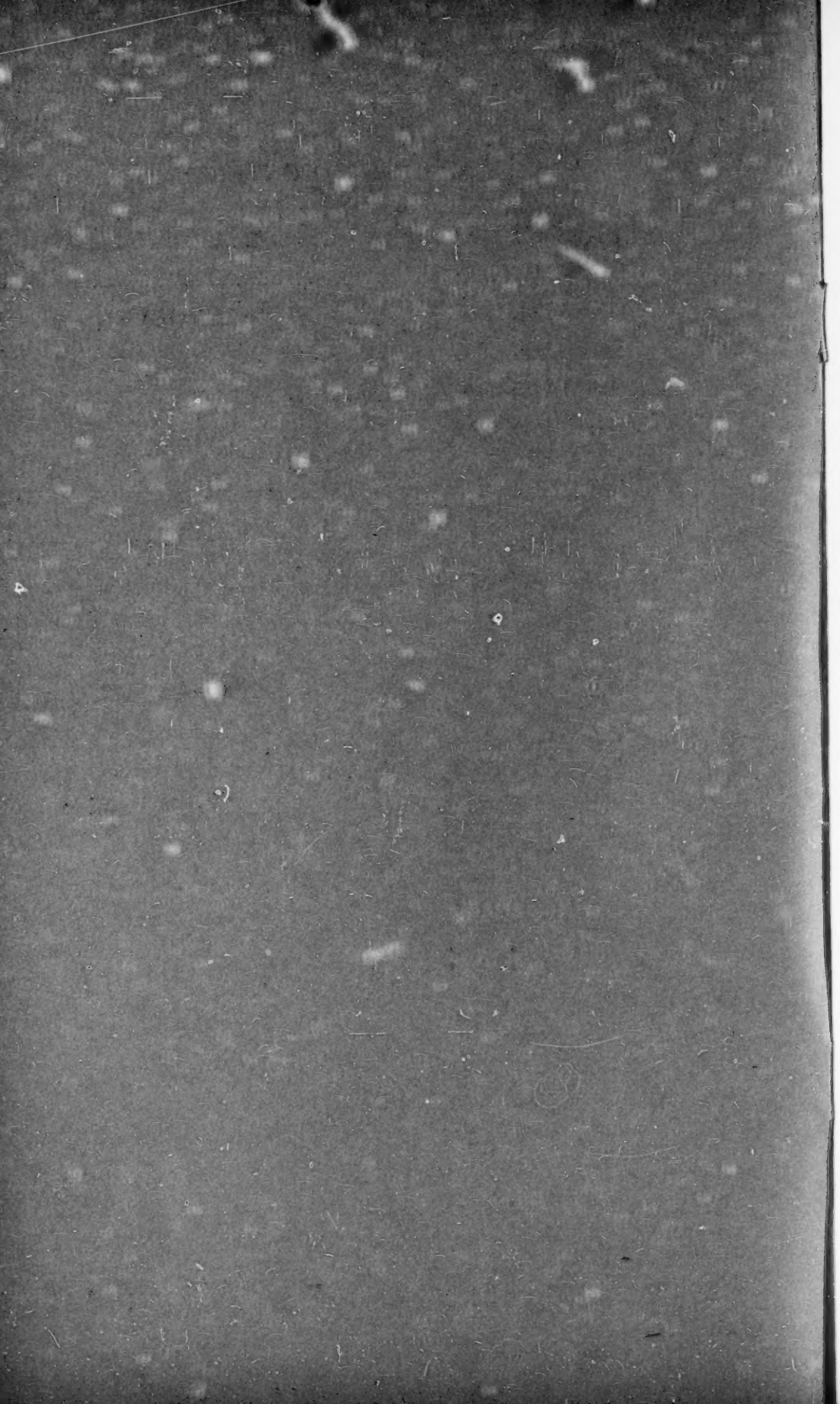

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 6
ARGUMENT 6
PETITIONER'S AUTHORITIES DISTINGUISHED 11
CONCLUSION 15
CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Daniels v. Williams, ____, U.S. ____, 106 S. Ct. 662 (1986).....13

Fuentes v. Shevin, 407 U.S. 67 (1972).....13

Moore v. East Cleveland, 401 U.S. 494 (1977).....13

Barsky v. Board of Regents, 347 U.S. 442, 99 S. Ct. 648 (1954).....14

Lewis v. Flynt, 439 U.S. 438, 99 S. Ct. 648 (1979).....14

STATUTES:

La. R. S. 37:776(7).....3

La. R. S. 37:776(8).....3

La. R. S. 37:776(10).....3

La. R. S. 37:776(16).....4

La. R. S. 37:779.....7

La. R. S. 37:780.....4,5,8

La. R. S. 49:950-970.....5

La. R. S. 49:956.....13

La. R. S. 49:964.....9,13

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FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

On October 31, 1986 the Louisiana Supreme Court refused petitioner's request that it grant writs of certiorari to the Louisiana Fourth Circuit Court of Appeal.

Respondent herein, Louisiana State Board of Dentistry, respectfully prays that the petition of Houston David Hughes, D.D.S. to review the judgment and opinion of the Louisiana Fourth Circuit Court of Appeal entered on May 12, 1986 be denied.

On May 2, 1986 the Louisiana Fourth Circuit Court of Appeal rendered a decision in the matter of *Hughes vs. Louisiana State Board of Dentistry.* The opinion is reported at 490 So. 2d 1097 (La. App. 4th Cir., 1986). The

Louisiana Fourth Circuit Court of Appeal upheld a judgment of the Civil District Court for the Parish of Orleans, the Honorable Robert Katz, presiding. The lower court's opinion is unreported; however, it is a part of the record in this matter. Judge Katz affirmed the suspension of Houston David Hughes' dental license by the Louisiana Board of Dentistry. Also of record are detailed findings of fact, conclusions of law and a decision issued on December 21, 1984 by the Louisiana State Board of Dentistry.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges that the procedure employed by the Lousisiana State Board of Dentistry violated his right to due process of law under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On November 16, 1984, the Louisiana State Board of Dentistry ("Board") caused to be served upon Dr. Houston David Hughes a notice to show cause "why his license should not be suspended, revoked, restricted or limited." The charges contained in the notice to show cause were based upon certain violations of Title 37, Section 776 of the Louisiana Revised Statutes ("The Louisiana Dental Practice Act").

The first charge concerned Dr. Hughes' practice of permitting two (2) dental assistants to engage in the unauthorized practice of dentistry. More specifically, the dental assistants, Linda Chenevert and Dannie Downing, cemented, banded, and wired braces to seven (7) patients. This conduct constitutes professional incompetency, substandard practices for a dentist in Louisiana and unauthorized practice of dentistry in violation of La. R. S. 37:776(7),(8) and (10) which provide:

> "The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other limits or restrictions on any dental license or permit issued under this Chapter for any of the following reasons:
>
> (7) Professional or dental incompetency.
>
> (8) Continuing or recurring dental practice which fails to satisfy the prevailing acceptable standards of dental practice in this state.
>
> (10) Employing, procuring, inducing, aiding, or abetting a person not licensed or registered as a dentist to engage in the practice of dentistry; but the person practiced upon shall not be an accomplice, employer, procurer, inducer, aider, or abetter within the meaning of this provision."

The second charge also concerned the unauthorized practice of dentistry. The charge related to the practice of five (5) assistants, Chenevert, Downing, Teresa Butzow, Dianne Boyce and Dorothy McCants. The charge stated that these dental assistants were allowed to "cement, band and wire" braces to patients in violation of La. R. S. 37:776(10).

The third and final charge related to Dr. Hughes' misrepresentations to the general public that he specialized in orthodontics in violation of La. R. S. 37:776(16) which provides:

> "The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other limits or restrictions on any dental license or permit issued under this Chapter for any of the following reasons:
>
> (16) Any conduct intended to deceive or defraud the public."

The record indicates and Dr. Hughes does not dispute that he is not a licensed orthodontist in the State of Louisiana.

The Board origially set Dr. Hughes' hearing for December 8, 1984 pursuant to La. R. S. 37:780. On or about November 19, 1984, Dr. Hughes filed motions to continue that hearing, to quash the charges, and to produce documents. The Board denied these motions. On December 6, 1984, Dr. Hughes retained an additional and/or third attorney, Mr. Arthur Lemann, III, who filed an additional motion to continue the December 8, 1984 hearing. The Board denied that motion as the notice requirement of La. R.S. 37:780 had been satisfied. On December 7, 1984, Dr. Hughes' counsel took discovery depositions of two witnesses (Mrs. Judy Hubert and Christine O'Quinn).

The hearing commenced on December 8, 1984 and continued until the early morning of December 9, 1984. During the course of the hearing the Board heard from fourteen (14) witness, including Dr. Hughes himself. On December 21, 1984, the Board rendered its decision

together with detailed findings of fact and conclusions of law. Six (6) charges were dismissed by the Board's Panel for insufficient evidence. The Panel sustained the other seven (7) charges. The Board suspended Dr. Hughes' license for a period of five (5) years on each count, said suspensions to run concurrently, and fined him $1,000 on each count plus costs, fees and expenses incurred in connection with the hearing. All this was done in accordance with La. R. S. 37:780B.

On January 18, 1985, Dr. Hughes filed a written request for reconsideration and/or a rehearing which was denied on January 21, 1985. Dr. Hughes then filed a Petition for Judicial Review in the Civil District Court for the Parish of Orleans on February 20, 1985, in accordance with the Louisiana Administrative Procedure Act, La. R. S. 49:950 *et seq.* An order staying enforcement of the Board's decision was issued by Judge Katz. On June 28, 1985, the Civil District Court rendered judgment affirming the Board's decision. From this judgment, Dr. Hughes suspensively appealed to the Louisiana Fourth Circuit Court of Appeal. On May 12, 1986, that Court rendered a decision affirming in part and reversing in part the decision of Judge Katz. The Court of Appeal found charge 1, specifications 3, 5, and 7 were duplicative of the other charges and should not have affirmed by the lower court.

Dr. Hughes then sought a writ of certiorari from the Louisiana Supreme Court to review the decision of the Fourth Circuit Court of Appeal. The Louisiana Supreme Court denied Dr. Hughes' request. On January 26, 1987, Dr. Hughes filed with this Honorable Court a Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal. The Louisiana Supreme Court granted Dr. Hughes a stay order suspending the effects of the

Louisiana State Board of Dentistry decision pending this Honorable Court's disposition of the instant petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The decision below by the Louisiana Fourth Circuit Court of Appeal was correct and none of the actions of the Louisiana State Board of Dentistry violated any of Dr. Hughes' rights to substantive or procedural due process of law.

ARGUMENT

Petitioner contends in his statement of the case that Dr. Hughes was the founder and principal owner of "Denta-Care", a program designed to make dental care available to a large segment of the public. The Louisiana State Board of Dentistry is aware of no information to the contrary, and does not argue with that statement. However, the Denta-Care program has absolutely nothing to do with the charges filed by the Louisiana State Board of Dentistry. Petitioner attempts to transform his case into a first amendment case by interjecting a red herring issue, claiming that the Denta-Care program, if in fact it exists, made low cost dental services available to a broad segment of the population. Nowhere in the record does this issue appear, nor was it raised in any of the proceedings below.

Dr. Hughes was sanctioned for holding himself out to the public as an orthodontist when in fact he did not have the requisite ability or training, and for allowing unauthorized persons to practice dentistry.

Petitioner contends that the charges against him were not initiated by the patients; rather the patients were contacted by a detective agency hired by the Board. To support this contention petitioner cites to the Transcript of Hearing, December 8-9, 1984, Vol. III, pages 61-62. However, a close review of the testimony of Joan Chiasson indicates that while she was contacted by a detective agency for the Board, she originally came to the Board's attention through Dr. Thomas Kiebach, a licensed orthodontist in Baton Rouge, Louisiana, *Id.*, p. 62, 1. 4-7, who treated Ms. Chaisson in order to correct the damage done to her teeth by Dr. Hughes.

Petitioner implies that all was well until the Board engaged investigators to pursue him. The Board did initiate the disciplinary procedings by filing formal charges under La. R.S. 37:779. However, as the Court of Appeal found, these charges emanated from complaints of dentists, dental assistants and patients. The Board makes no apology for having thoroughly investigated these complaints before filing charges against Dr. Hughes.

The petitioner seeks to have this case reviewed to determine whether or not his rights to substantive or procedural due process have been violated.

In particular, he contends that his right to due process was violated in that the Board failed to grant his motion to continue his disciplinary hearing and failed to grant him a recess during the proceeding. On November 13, 1984, the Board served a notice to show cause on petitioner as to "why his license should not be suspended, revoked, restricted or limited." It informed Dr. Hughes that a

hearing would be held on said charges on December 8, 1984. Dr. Hughes filed a motion to continue the December 8, 1984 hearing on November 19, 1984, which was denied by the Board. On December 6, 1984, Dr. Hughes retained a third attorney for his defense team, Arthur A. Lemann, III, who filed an additional motion to continue the hearing, which was also denied by the Board.

Petitioner contends that this failure of the Board to grant a continuance somehow denied him procedural or substantive due process of law. In addressing these allegations, the Louisiana Fourth Circuit Court of Appeal reasoned that La. R.S. 37:780A provides for 20 days advance notice of the time fixed for an administrative hearing and stated:

> "The record clearly reflects that such notice was given to Dr. Hughes. The record adequately reflects that counsel for Dr. Hughes was retained even before charges were formally filed and had contacted the Board's special counsel in this regard. None of the charges filed by the Board came as a surprise to Dr. Hughes. Dr. Hughes has made no showing of substantial prejudice by the Board's refusal to grant him a continuance".

The administrative record will clearly reflect that Dr. Hughes received a fair and impartial hearing in that (a) his counsel knew of the formal charges *before* they were filed by the Board, (b) extensive dialogue took place between his counsel and the Board's prosecutor on particulars and details of the charges and specifications filed against Dr. Hughes, (c) his counsel took two (2) discovery depositions of the witnesses Mrs. Judy Hubert and Ms. Christine O'Quinn, (d) he had sole custody and control of the chief documents in the case (all patient records and other

relevant information), and (e) at the administrative adjudication, Dr. Hughes, through his three counsel, effectively cross-examined each witness used by the prosecuting attorney and, presented eight (8) witnesses on his behalf. Moreover, if Dr. Hughes felt that the Board's preadjudication procedures were unreasonable, he had a right to seek interlocutory relief from the state district court pursuant to the Louisiana Administrative Procedure Act. La. R.S. 49:964A.

Petitioner next contends that he was denied due process of law in that his disciplinary hearing began at 10:06 a.m. on Saturday, December 8, 1984 and continued until 3:30 a.m., Sunday, December 9, 1984. It should be pointed out that counsel for Dr. Allen, Mr. Frank Dickerson, had been involved with the case prior to the institution of the formal charges. Mr. Lemann was associated as a third counsel on December 6, 1984, two (2) days prior to the hearing. It is quite clear that Dr. Allen's counsel had an adequate opportunity to prepare a defense and was on specific notice of charges against Dr. Hughes well in advance of the beginning of the hearing. Petitioner selectively quotes from the transcript, in an attempt to show prejudice. A reading of the entire colloquy in context reveals:

> "MR. LEMANN: It's now been 16½ hours, almost 16½, I want the record to be abundantly clear that I don't feel as though I am effectively representing my client. I find that I can no longer concentrate; I an tired, I cannot keep my thoughts in order, and I want the record to so reflect.
>
> MR. WOOTAN: I take exception to that. I think Mr. Lemann is doing a wonderful job, and he and his other two co-counsel, I think, are more than

adequately representing Dr. Hughes, so I take exception with your feeling.

MR. LEMANN: I think your thinking befuddles me now."

Transcript of Hearing, December 8-9, Vol. V, pp. 446-447.

The record will also reflect that at the time of Mr. Lemann's complaint, the examination of witnesses was being handled by one of his two co-counsel, Mr. Dickerson.

"BY MR. DICKERSON:

Q State Your name, please, sir.
A Bobby Hunt.
Q Are you a patient of Dr. Hughes?
A I am.
Q And what is he doing for you now?
A Put braces on my teeth."

Transcript of Hearing, December 8-9, 1984, Vol. V, pp. 446-47.

It should further be noted that after Mr. Lemann's complaint concerning fatigue (at p. 446 of Volume V of the Transcript and cited at page 4 of the Petition), he still fully participated in the proceeding. When co-counsel claimed Mr. Lemann was asleep, Mr. Lemann was awake enough to hold a cigarette and smoke. He was also alert enough, even late in the hearing, to participate repeatedly in the examination of witnesses and making of objections. The assertion at page 11 of the Petition that Mr. Lemann did not so participate is without basis in fact. Questioning and objection by Mr. Lemann appear in the Transcript of Hearing, Vol. V, at pp. 447, 453, 454, 459, 464, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513,

515, 516, and 521. Mr. Lemann was fully awake, participating and still clever enough to attempt to lay out a basis in the record for a subsequent claim of ineffective assistance of counsel.

Although the Civil District Court for the Parish of Orleans stated that a continuance might have been preferable, and the Court of Appeal indicated that the hearing was "quite lengthy," both courts, after carefully reviewing the administrative adjudication record, concluded that the refusal to grant a continuance or a recess was not so arbitrary and capricious as to constitute a violation of the due process clause of the United States Constitution.

PETITIONER'S AUTHORITIES DISTINGUISHED

(A) *Assistance of Counsel.* Petitioner relies principally on criminal law cases in which the refusal of a trial court to grant a continuance did, in fact, operate to deprive a defendant of effective assistance of counsel to which he is entitled under the Sixth Amendment to the United States Constitution. Those cases hold that where a defendant is not allowed a continuance in order to substitute counsel, he is in fact denied a right to choose his counsel, rather than being denied effective assistance of counsel.

It is quite clear that throughout the proceedings between the Louisiana State Board of Dentistry and the petitioner, the petitioner at all times had the right to choose counsel, and, in fact, had three (3) attorneys (two of whom were criminal lawyers) present throughout. Mr. Dickerson, Mr. Irving and Mr. Lemann were present and in fact jointly participated in the hearing.

Petitioner cites this Honorable Court to *Chandler v. Fretag*, 348 U.S. 3 (1954), and *Ungar v. Sarafite*, 376 U.S. 589 (1964), for the proposition that refusal to allow a continuance can result in ineffective assistance of counsel or render the right to defend meaningless. These cases are clearly distinguishable in that Dr. Hughes did not seek to substitute counsel, which might require preparation time by the substitute attorney. Rather, he merely sought to add a third attorney, in addition to two (2) existing attorneys, one of whom had handled the matter prior to the institution of formal charges.

The request to add additional counsel was made two (2) days prior to the scheduled hearing. The members of the hearing panel had allotted time for this public service activity, numerous witnesses had been subpoenaed, and other administrative matters had been scheduled. The last minute effort by Dr. Hughes to add additional counsel and request a continuance was more properly considered a dilatory tactic in light of the fact that he already had two attorneys representing him in this matter. The Board simply had to balance competing interests of public health and safety versus the petitioner's enjoyment of a third attorney.

(B) *Procedural Due Process.* Petitioner next contends that the actions of the Board somehow deprived him of procedural due process in that he was not afforded an opportunity to be heard. He quotes from *Powell v. Alabama*, 287 U.S. 45 (1932):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it

> reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the contitutional sense."

The Louisiana State Board of Dentistry does not take issue with this statement. The Board agrees that Dr. Hughes had a right to be heard and to be represented by counsel, if he so chose, and that both rights constitute fundamental requirements of due process.

In *Daniels v. Williams,* ____ U.S. ____, 106 S. Ct. 662 (1986), this Honorable Court held that there were two basic components to due process. One is procedural due process, which encompasses notice and a right to be heard. *Fuentes v. Shevin,* 407 U.S. 67 (1972). The second is substantive due process, which protects individuals from certain arbitrary governmental actions, regardless of the fairness of the procedure through which the action takes place. *Moore v. East Cleveland,* 401 U.S. 494 (1977).

In the instant case, Dr. Hughes was not denied procedural due process in that he received actual and constructive notice at least twenty (20) days prior to the hearing and he was allowed to be heard through his three (3) attorneys. The Louisiana Administrative Procedure Act provides for prehearing discovery (depositions, interrogatories, etc.). La. R.S. 49:956. Dr. Hughes in fact engaged in prehearing discovery by taking the depositions of two witnesses. Additionally, if he believed that the discovery period was inadequate, he could have filed a petition for review of preliminary agency action with the district court under La. R.S. 49:964. It is quite clear that the petitioner had adequate procedural safegards available to him. Dr. Hughes was given every opportunity via his attorneys to

participate in pretrial discovery. Additionally, the transcript of the hearing will reflect that Dr. Hughes testified twice on his own behalf. It is respectfully submitted that Louisiana State Board of Dentistry did not violate Dr. Hughes right to fundamental procedural due process in that he was given notice and a fair opportunity to be heard. Dr. Hughes was allowed to testify and have the counsel of three (3) attorneys.

(C) *Substantive Due Process.* Likewise the petition fails to show how Dr. Hughes was deprived of substantive due process. The record reveals that evidence was presented that Dr. Hughes allowed untrained, unlicensed personnel to perform dental procedures in violation of the Louisiana Dental Practice Act.

States have been granted broad powers in policing the licensing and activity of the professions. *Barsky v. Board of Regents*, 347 U.S. 442, 74 S. Ct. 650 (1954); *Lewis v. Flynt*, 439 U.S. 438, 99 S. Ct. 648 (1979). This Court has consistently held that the states and those fellow professionals charged with judging professional conduct must be granted discretion. In *Barsky*, this Court stated:

> "It is elemental that a state has broad powers to enforce standards of conduct within its borders relative to the health of everyone there... The state's discretion in that field extends naturally to the regulation of all professions concerned with health."

It is respectfully submitted that the decision of the Louisiana State Board of Dentistry was not arbitrary or capricious but was carefully made after reviewing extensive evidence of violations of a code of professional conduct, to wit, the Louisiana Dental Practice Act, concerning

the treatment of dental patients. These professionals must be granted discretion in determining the proper practice of the profession to protect the health and safety of the citizens of Louisiana.

Finally, the evidence that Dr. Hughes did in fact violate the Dental Practice Act by allowing non-licensed individuals to practice dentistry in his office is overwelming. Clearly, a finding by his fellow professionals that he violated their code of conduct, after receiving extensive evidence and allowing Dr. Hughes to present a defense, was not arbitrary and capricious. The members of the hearing panel found in their professional judgment that Dr. Hughes' actions in fostering and inducing the unauthorized practice of dentistry required sanctions.

CONCLUSION

It is respectfully submitted that the petitioner has wholly failed to sustain his burden of establishing under Rule 17 of the Rules of the United States Supreme Court that there are special and important reasons why a writ should be granted. The decision of the Louisiana Fourth Circuit Court of Appeal did not involve any questions of federal constitutional law that were improperly handled by the state courts. It is clear that the state courts addressed the issue and found that the Board did not act arbitrarily and capriciously, nor did the Board violate any of Dr.

Hughes' due process rights.

Respectfully submitted

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Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Respondent herein and that three copies of the above Brief of Respondent in Opposition were served upon Paul Baier, counsel for Petitioner, Dr. Houston David Hughes, by mailing same first class postage prepaid, addressed to his office at 4222 Hyacinth Avenue, Baton Rouge, Louisiana 70808, this 26th day of February, 1987. I further certify that all parties required to be served have been served.

GUY WOOTAN
Counsel for Respondent